THE STATE
versus
RUPIYA RUPIYA

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 6, 7, 10, 13, 27 & 28 November 2017

Assessors: **1. Mr Msengezi**
2. Mr Chidyausiku

Criminal trial

H M, Muringani for the state
E Dondo, for the accused

TSANGA J: The accused was charged with murder of his cousin on Christmas day 2016 on their way from Dotito business centre where they had gone to drink beer. He pleaded not guilty. It is not in dispute that the two had gone drinking on that day. The accused was having an illicit relationship with the deceased's wife which was indeed still on-going at the time that the deceased met his death. This much is evident from the evidence of the deceased's wife that was admitted by consent in terms of s 314 of the Criminal Procedure and Evidence Act [*Chapter 9:07*].

The salient point in the accused's defence was that he had killed the deceased in self-defence. On the way back from the drink, the deceased had accosted him about the affair with his wife and had then pulled his manhood. In anger and retaliation to the attack a fight had ensued. The accused pleaded self-defence he also said that he was intoxicated and could not have realised that that he would kill the accused person.

The State's evidence

The doctor who attended to the deceased's post mortem gave evidence on behalf of the State. He described the deceased whose body which he had examined as that of a 45 year

old male, wearing blood-stained clothes with bruises on the forehead. He also had blood on the nose and mouth and his external genitals were oozing blood. He also had faeces on his clothes. Furthermore he had skin marks on his neck. He also had rib fractures, a depressed skull fracture and a deep bruise at the back of the skull. He had concluded that the major cause of death was head injury caused by a blunt object. He had also noted strangulation. His reason for noting head injury as the major cause of death was because of its severity. In cross examination he explained that he had not done a full internal examination because medically, if doctors get to the cause of death and can safely conclude without going further, then that major cause of death that has been observed is recorded. He dismissed the argument that since the accused had been drinking he could have died from choking on his own vomit, on account of the fact that the external symptoms which the deceased showed such as faeces, blood oozing from the nostrils are symptoms associated with manual strangulation. As a result of increased abdominal pressure due to strangulation the body had tried to release the pressure through open orifices. As the doctor explained:

> "When someone is suffocating air will try to escape and the body looks for orifices such as the nostrils, anus and urethra to release that air".

His conclusion was that strangulation was what had caused the fluids to come out that way. The accused himself did not deny strangling the accused in the heat of the scuffle and indeed that strangulation had come first before he resorted to the use of the stone. So there is no need to labour that point. We found his evidence professional and to the point. The onus thereafter was on the accused to convince the court of his defence.

The accused's evidence

In his evidence he denied that he was still in a relationship with the deceased's wife. He was not honest on this aspect. He denied have a continued affair with the deceased's wife when clearly the admitted evidence reveals this was an ongoing affair. Ruth Nyikadzino's admitted evidence was very clear that the affair had been very much ongoing and that she had resumed the affair because the accused had kept stalking her. Her evidence was also clear that her husband had discovered the continuing affair again in 2016 and that they had had several arguments about it. Whilst it is true that the deceased and the accused had gone drinking together on Christmas day it was clearly not true that the matter of the affair had been resolved. If this was so there would have been no reason for the deceased to have raised it again with the accused.

In his warned and cautioned statement which was admitted in evidence in terms of s 256 of the Criminal Procedure and Evidence Act, the accused said the following about the material aspect of the events of that day that led to the fatal attack on the deceased.

> "Takemore Chibanda attacked me holding my penis, I assaulted him using my elbow in retaliation on the eyes, he fell on the ground and a fight broke. I strangled him, picked up a stone, struck him on the head and he fainted. I ferried him intending to take him to the police to make a report that I had injured my colleague and by the time I realised he was dead I left him on the road side. I returned to Mflambo night club and continued drinking with my colleagues. I did not tell anyone about what transpired and later proceeded with Joshua Chibanda. I then took my clothes to Aunt Rona Mupokose to take it for some prayers. I consulted prophet Nkunda Pius and Kehard Nyabuna, told them that I murdered Talkmore Chibanda and that they must pray for me for Dutch Courage (against avenging spirit) When I got involved in a physical altercation with the deceased, I though he wanted to assault me over the issue that I am in an adulterous affair with his wife Ruth Nyikadzino."

His evidence in court on the material aspects of what happened at the crucial point of the attack following the enquiry about the ongoing illicit affair was as follows and I quote.

> "On our way home he raised the issue of my relationship with his wife. I was surprised as it was an issue we had resolved. I was in front. He pulled my private parts from behind. I was surprised and as I looked back I struck him with an elbow on top of his eye. He tripped me and I fell. The deceased was on top of me. I held him by the neck and kept holding and I was crawling and indicating that even if I wronged him he should forgive me. I felt a stone, picked it and hit him. He fell to the ground landing on his back. As I got up I saw beer coming from his nostrils. I lifted him and saw he was powerless. I walked with him intending to get some water. I then placed him by the side of the road. I then went to the bar and sat with my head down"

The accused then went on to give evidence of the drinking that he had done earlier that night telling the court that he had consumed at least two 750ml bottles of chateaux with his friends. There was notably a variance with warned and cautioned statement in which he said that the deceased had fallen to the ground.

Analysis

For one to rely on self-defence there must be an unlawful attack, which had commenced or was imminent. The means used to avert the attack must be reasonable. The action taken must also be necessary to avert the attack. Looking at the applicable principles in light of the totality of the evidence placed before the court, there was an attack on the accused which had commenced in the sense that the deceased pulled his penis. The Investigation

Officer had indeed taken the accused to the hospital after his arrest and told the court that when he was arrested he had tied them with some fibre rope. He did say that his penis had been pulled by the deceased. He had also complained of penile and testicular pain and that he was urinating blood. The doctor who attended to him who was the same one who conducted the post mortem confirmed that he had a grossly swollen penis and some minor swelling on his testicles. He described the potential effects of swelling in such instances as the likelihood of damage to the urethra and that it can also cause erectile dysfunction. He, however, and materially so, described the condition as moderate. He had prescribed antibiotics and pain killers and dressing to be carried out at the clinic.

Materially as gleaned from the warned and cautioned statement as to what happened, the accused's response to that attack was to elbow the deceased in the eye. His warned and cautioned statement is clear that as a result of that defensive action the deceased fell to the ground. His action in elbowing him in the eye at that point was reasonable and proportionate. But once the deceased had fallen to the ground the strangling and the hitting with the stone had ensued was clearly disproportionate to the attack that he had faced. It is unlikely that the deceased would have kept the grip at that point given the doctor's description of the strangulation effects his body was going through. In other words he had thereafter not acted in proportional self-defence but a vengeful fight. This court is asked to believe that a man who was being strangled and whose body for all intents and purposes evidenced every symptom of failure to breathe and distress would be preoccupied with remaining tugged at the accused's penis.

What is very clear is that the attack, once the accused had successfully elbowed the deceased in the eye, is that it thereafter became a vengeful attack. In his warned and cautioned statement the accused said he had murdered the deceased. At no point did he emphasise that that his primary motivation in strangling and hitting him with the stone was self-defence. It was his elbowing the deceased in the eye which was an act of self-defence. There was nothing in the warned and cautioned statement to suggest that once the deceased fell to the ground, he had remained tugging at the accused penis. What he says is that once he had elbowed him in the eye a fight ensued. The accused's own evidence was clear that thereafter there had been a fight. Strangling the deceased was certainly not necessary to avert the attack let alone bashing his head with a stone. Beyond the elbowing the accused was clearly determined to plummet the deceased with absolute no regard to the consequences of his actions.

What was also very clear to the court from the doctor's evidence was that there had been a vicious attack on the deceased. He had cracked ribs, bruises on the forehead, strangulation marks, and his body had released strangulation symptoms, and in addition he had a depressed skull fracture and deep bruises at the back of the skull from the attack with the stone. His clothes were soaked in blood. The state counsel's engagement with the totality of the facts in its closing submissions was pathetically cryptic and lacking in depth.

Whilst clearly murder in terms of s 47 (1) (a) is not proven by the facts, it is also evident that in the actions taken by the accused i.e. strangling and using a stone, he was reckless as to the consequences. As stated in *S* v *Mukwambuwe* 2014 (2) ZLR 115 (H) the first key question in determining causation in culpable homicide cases is whether but for the accused's conduct, the consequence would have occurred. The second test is whether it was reasonably foreseeable that accused's conduct would lead to that consequence. The consequences of using a stone to attack a person are clear. The head is a very delicate part of the human body. Strangulation itself is highly problematic, designed as it is to deprive the attacked of oxygen. This was therefore a case where the accused should have foreseen that his actions in strangling the deceased and thereafter using a stone to attack him would result in death. This is therefore very much a case where the accused could easily be convicted of murder in terms of s 47 (1) (b) of the Criminal Code were it not for the circumstances under which the fight started.

Accordingly this court finds the accused guilty of culpable homicide in terms of s 49 of the Criminal Code.

Mitigation, aggravation and sentence

On the social aspects of mitigation the accused was said to be 37 years old, married with two children aged 10 years and four years. He was also self-employed and besides seven bovines has no other property of meaningful value. It was said that after the incident the family had met and appointed the accused as the head of the deceased's family. He had also paid one bovine and one goat to the traditional leader as mandated by customary rituals in that community. Moreover he was said to have lost his own relative.

On the legal aspects of mitigation it was pointed out that the accused has been lodged in custody from January 2017 and as such any sentence imposed should be discounted on this account. Furthermore, having been found guilty of culpable homicide this was emphasized to be a crime of negligence. As such in imposing sentence the court was urged to take into

account the absence of any intention to kill. His drunkenness was also said to be a factor to be considered in mitigation.

In aggravation the state argued that culpable homicide arising from violent conduct is a serious offence which generally attracts a custodial sentence. The court was also urged to hand out deterrent sentence in light of the prevalence of homicides arising after beer drinking. Moreover the negligence in killing the deceased from strangulation and stone battering was said to be very high. The moral blameworthiness was also said to be exacerbated by the fact that the accused had an adulterous relationship with the deceased's wife.

In arriving at an appropriate sentence this court takes into account that the accused is a first offender and that he is indeed a family man. The fact that he says he has been made head of the deceased's family raises some eyebrows in this instance given that he was the deceased's wife's lover. It is difficult to see how this acts in mitigation and whether the interests of the children were at all taken into consideration in having fostered upon them as a father a man who was having a relationship with their own mother and who killed their own father as a result of that relationship. The fact that he was intoxicated at the time, but not so much as to lack appreciation of his acts, is to be taken into account See the discussion *in S* v *Masina* 2010 (1) ZLR 498 (H) on intoxication as mitigatory.

Given the overall circumstances of this case and the high degree of negligence were it not for the mitigating factors I have discussed, an appropriate sentence would have been in my view in the region of ten years. As stated in the case of *S* v *Kinnaird & Anor* 2015 (2) 631 (H) "it sometimes necessarily happens that the nature of a given crime, the *modus operandi* of its perpetration, and the motive as well as the resultant harmful effect (s) the crime causes to both the victim and the society, no other theory of punishment except retribution will meet the justice of the case".

The accused has spent one year in prison. Accordingly, in view of the need to balance both mitigating and aggravating factors the accused is sentenced to 8 years imprisonment of which 2 years is suspended for five years on condition that the accused does not during that time commit a crime involving violence to which he is sentenced to a period of imprisonment without the option of a fine.

National Prosecuting Authority: State's Legal Counsel
Pundu & Associates: Accused's Legal Practitioners